Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
National Association of State Utility	)	CG Docket No. 04-208
Consumer Advocates' Petition for		)
Declaratory Ruling Regarding	)	
Truth-in-Billing	)	

REPLY COMMENTS OF VERIZON WIRELESS

VERIZON WIRELESS

John T. Scott, III
Charon Phillips
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005
(202) 589-3740

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SUMMARY

The comments demonstrate that the Commission should consider at most limited changes to its existing rules in the form of preemptive national rules that track the Assurance of Voluntary Compliance ("AVC") entered between 32 State Attorneys General and three national wireless carriers. Many of the rules that the consumer groups propose bear little relation to the stated problems. Moreover, the consumer groups rely on faulty complaint data that is irrelevant and should be discounted.

The comments show that the AVC provisions are appropriate and sufficient to address the concerns raised by the consumer groups with respect to the definition of government-mandated charges, separation of bill categories, and point-of-sale disclosures. The Commission should reject proposals to require carriers to separate the components of their federal regulatory charges on bills and standard labels, and it should also clarify that wireless carriers can recover their costs of contributing to the interstate Telecommunications Service Relay ("TRS") program as line items on their bills. The Commission should also not adopt a return rule that requires carriers to defer application of early termination fees ("ETFs") until 45 days after customers obtain their first bill.

The Commission should also reject the consumer groups' request for the Commission to adopt a complex regulatory scheme that includes both federal rules and individual state wireless billing regulation. Contrary to the

claims of the consumer groups, there is no provision of law that preserves state authority over wireless billing practices. The consumer groups ignore established and controlling law that permits the FCC to preempt state CMRS billing regulation. Given that wireless services are increasingly sold to and used by customers on an integrated, interstate or even national basis, only national oversight can reach all carriers and benefit all customers. The Commission should therefore preempt state CMRS billing regulation.

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Verizon Wireless respectfully submits reply comments on the *Second Further Notice of Proposed Rulemaking* ("*Second FNPRM*")[1] in the captioned dockets. If the Commission imposes rules on wireless carriers in this proceeding, they should be preemptive national rules that track the Assurance of Voluntary Compliance ("AVC") between 32 State Attorneys General and three national wireless carriers.

BACKGROUND

The comments demonstrate that the Commission should consider at most limited changes to existing rules governing CMRS providers' bills. The Commission's recent expansion of its truth-in-billing rules, which subjects CMRS

[1] Truth-in-Billing and Billing Format; National Association of State Utility Consumer Advocates' Petition for Declaratory Ruling Regarding Truth-in-Billing, *Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking,* 20 FCC Rcd 6448 (2005) ("*Second FNPRM*" or "*Second TIB Order*").

providers to the obligation that charges on bills must be accompanied by a "brief, clear, non-misleading, plain language description" of the services provided,[2] should be sufficient to address the concerns in the record, particularly when combined with other provisions of the rules that also apply to CMRS providers. The initial comments of consumer groups do not acknowledge this new CMRS requirement, but instead request a battery of additional rules. Nonetheless, their comments boil down to two concerns. First, they claim that certain labels associated with line-item charges can leave the impression that the government has mandated these fees.[3] They argue that line-item charges that imply that they are governmental fees are misleading if in fact the carrier has elected to increase general revenue with a "carrier add-on" fee.[4] In short, the argument is that because carrier and governmental fees are commingled, when a customer is faced with a new fee or surcharge, "it is not clear whether the government or the carrier is to blame."[5] Second, these consumer groups allege that customers do not discover that there are carrier-imposed fees until they receive their first monthly bill, and thus urge that carriers be required to provide more complete disclosures of those fees at the point of sale.[6]

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2 *Id.,* amending 47 C.F.R. § 64.2400 (b) to remove the exception from Section 64.2401(b) for CMRS providers.

3 AARP, Asian Law Caucus, Consumers Union, Disability Rights Advocates, National Association of State PIRGs, National Consumer Law Center at 6 ("AARP").

4 National Association of Attorneys General at 4 ("NAAG").

5 AARP at 6.

6 *Id.* at 3.

Even though these two concerns are narrow and already addressed either by the FCC's existing rules or carrier practices, the consumer groups unwisely advocate a complex regulatory scheme that includes both federal rules and individual state regulation. Many of the consumer groups' proposals bear little relation to the stated problems, and they base the suggested rule changes on speculative problems rather than specific concerns. In some cases, the consumer groups' proposals would actually cause more customer confusion and not less. One proposal by NASUCA, an extended return policy, is not billing regulation at all and is therefore outside the scope of this proceeding entirely.

While the consumer groups assert that there has been a large public outcry about disclosure of line-item charges, they rely on complaint data to support their claims that is irrelevant and should be discounted. In fact, Verizon Wireless' own data related to complaints filed against the Company show that complaints about line items on bills and disclosures at the point of sale are very small in number and constitute a minute percentage of total complaints filed against the Company.

In addition to the failure of the consumer groups to establish a nexus between their proposals and verifiable market failures, these groups disregard the fact that changes to billing systems are costly. This is particularly the case if carriers are forced to comply with varying state requirements. Nationwide wireless carriers cannot operate efficiently when they are subject to varying state rules.

For all of these reasons, the Commission should find that additional rules are unnecessary. If the Commission considers imposing any rules on wireless carriers in this proceeding, preemptive national rules based on the AVC would strike the proper balance by mandating specific disclosures while minimizing the impact on carrier billing systems and other practices. The Commission should reject the consumer groups' other proposals as inconsistent with the law and contrary to the public interest.

I. THERE IS INSUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT NEW TRUTH-IN-BILLING RULES.

The consumer groups base their case for the need for the FCC to adopt additional truth-in-billing rules on the number of consumer complaints filed against wireless carriers. These statements do not provide justification for additional rules.

The consumer groups point to data purporting to show a large volume of complaints filed against wireless carriers as evidence that the Commission should adopt truth-in-billing rules. For example, the National Association of State Utility Consumer Advocates ("NASUCA") states that there were over 19,000 comments filed in response to its petition in this docket, and that the bulk of telecommunications complaints are related to carrier bills and charges.[7] The National Association of Attorneys General ("NAAG") states that there were 130,000 total complaints lodged at the California Public Utilities Commission ("CPUC") against telecommunications companies in California, claiming that

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[7] NASUCA at 5.

there were more than 30,000 in 2004, one-third of which were against CMRS providers.[8] NAAG argues that the total number of reported complaints is a sign of much more consumer dissatisfaction because only a small percentage of customers actually complain to a governmental agency.[9]

These complaint figures do not justify additional truth-in-billing rules for several reasons. First, contrary to NAAG's contention that the complaint data understates consumer concerns, NAAG might actually overstate the number of complaints. As wireless carriers demonstrated in the CPUC's proceeding on consumer protection, the CPUC's data is faulty because the CPUC does not distinguish between "inquiries" and "complaints", and the CPUC does not have a system in place to account for duplicate complaints.[10] To the extent that the Commission relies on complaint data as a reason to adopt rules, it must ensure that it is accurate.

Second, the consumer groups do not identify how many of these "complaints" were related to the rules proposed in this proceeding about line-item charges or point-of-sale disclosures. Without facts to demonstrate that

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[8] NAAG at 3. NAAG also claims that there were 2,000 complaints filed against CMRS providers in 2003 and 2004 with the Texas Attorney General, there were 848 wireless complaints filed with the Illinois Attorney General in 2004, and Oregon received approximately 300 complaints regarding the billing and disclosure practices of wireless carriers. *Id.*

[9] *Id.*

[10] *See* Initial Comments of the Cellular Carriers Association of California on Issues Other Than Economic Impact, RM 00-02-004, at 5-6; Opening Comments of Omnipoint Communications, Inc. dba T-Mobile (U-3056-C) on the March 2, 2004 Draft Decision of Commissioner Wood Regarding Rules Governing Telecommunications Consumer Protection, RM 00-02-004, at 5-6.

complaints relate directly to the proposed rules at issue in this proceeding, the number of complaints cited by the consumer groups is irrelevant and cannot be the basis for Commission action in this proceeding. For instance, NASUCA's reliance on 19,000 complaints that might have been filed about its petition is misplaced. That petition concerned whether line items should be prohibited. The Commission has denied NASUCA's petition and now proposes to address different issues. The Commission must develop a new record related to these specific proposals.

Third, Verizon Wireless' own data related to complaints reveals that over the past six months, out of 45.5 million customers, there were only 19 complaints about disclosures about line items on bills, an average of about three per month, and five such complaints about disclosures at the point of sale disclosure, or an average of less than one per month, filed against the Company at the FCC, the state commissions, and with the state attorneys general. Verizon Wireless' complaint data shows that there is no great public concern related to line-item charges and point-of-sale disclosures, and the consumer groups fail to demonstrate otherwise.

II. ADDITIONAL RULES GOVERNING BILL STRUCTURE ARE NOT NECEESSARY.

There are five issues raised in this proceeding related to how bills should be structured: how to define government-mandated charges, whether the Commission should require separation of sections on bills, whether there should be standardized labels for bill sections, whether bills must separately state the components of federal regulatory charges, and whether wireless carriers should be permitted to recover the costs of interstate telecommunications relay service ("TRS") as a line-item charge. With respect to the first four issues, the comments demonstrate that no additional rules are needed, certainly not the intrusive rules proposed by several consumer groups. Proponents of these rules simply fail to demonstrate with factual evidence that there is any connection between the rules they want imposed and a particular problem that each such rule would address. Should the Commission decide that additional rules are needed, the approach taken by 32 State Attorneys General in reaching the AVC with the three largest wireless providers would be the appropriate model. The AVC requires carriers to separate charges that the carrier is required by the government to collect from consumers, and then remit to the government, from other charges. The consumer groups have demonstrated no additional issues that would not be resolved by such a requirement. With respect to TRS, the Commission should clarify that wireless carriers are permitted to include line items on their bills that are designed to recover TRS costs.

A. The Comments Support the AVC Definition of Government-Mandated Charges.

The record overwhelmingly supports defining government-mandated charges as those that a government requires the carrier to collect from customers and that the carrier remits to the government.[11] As Cingular notes, this definition of government-mandated charges is consistent with the AVC.[12]

The "collect and remit" definition of mandatory government charges is appropriate because it addresses the consumer groups' main concern, which is the belief that customers cannot distinguish between government charges and those that the carrier has discretion to impose. Nextel agrees, stating that the "collect and remit" definition allows customers to compare carriers' price plans in a meaningful manner because it includes only those charges that carriers do not have the discretion to vary, such as state and local taxes.[13] The Texas Office of Public Utility Counsel states that the "collect and remit" definition of government-mandated charges most closely tracks what consumers understand "mandatory" to mean.[14] For these reasons, if the Commission establishes new rules, it should adopt the "collect and remit" definition of government-mandated charges.

B. The Commission Should Not Require More Bill Category Separation Than the AVC.

Many parties urge that if the Commission considers adopting new rules that require separate categories on bills, it should require government-mandated charges to appear in a separate section of the bill.[15] These recommendations track the approach of the AVC, as detailed in Verizon Wireless' comments. The

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11 *See, e.g.,* AARP at 7; BellSouth at 10; Cingular at 47; Missouri PSC at 3; NAAG at 1; National Association of Regulatory Utility Commissioners at 3 ("NARUC"); NASUCA at 4.

12 Cingular at 48.

13 Nextel at 9.

14 Texas Office of Public Utility Counsel at 2-3.

15 AARP at 6, 9; Cingular at 52-53; NASUCA at 12.

Commission should reject any proposal to require carriers to separate charges that differs from the AVC.

As Cingular points out, if the Commission adopts a definition of mandated charges for wireless carriers that includes only those charges that the government requires to be collected from consumers, and then prohibits commingling of these charges with discretionary charges, the Commission will have effectively addressed the concern that carrier line items may mislead customers.[16] This is the case because customers will be able to identify easily which fees are directly tied to governmental requirements and which are carrier charges, thereby allowing customers to make "apples to apples" comparisons between carriers' charges.

NASUCA argues that the Commission should require another category, "Carrier Imposed Charges" on carriers' bills.[17] It offers, however, no factual evidence that such an additional requirement would resolve any concrete problem. As long as the Commission adopts the "collect and remit" definition of government-mandated charges, customers will understand that anything outside that category is subject to the discretion of the carrier, which is the issue that the consumer groups ask the Commission to address.

In its comments, NAAG proposes that carriers should create a pre-tax subtotal consisting of monthly service charges and discretionary charges, and then

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16 Cingular at 54.

17 NAAG at 1, 9; NASUCA at 13-14.

apply taxes and regulatory fees to this base.[18] The Commission should reject this approach because although it does not necessitate a separate section of the bill like NASUCA's proposal would, it is likely to cause a great deal of customer confusion. Because each percentage-based tax and fee is levied on its own statutorily defined base, many taxes and fees will bear no obvious relationship—at least, not one that is obvious to consumers—to the tax-base subtotal advocated by NAAG. For example, some taxes do not apply to charges for interstate service,[19] others apply only to charges up to a monthly cap,[20] and some include certain types of taxes and fees in the tax base.[21] These and other variations in the laws imposing taxes and fees are what determine whether and how such items apply, and NAAG's proposed artificial tax-base construct will not advance customers' understanding of these applications. Such a rule would micromanage the format of carriers' bills without addressing, let alone solving, any demonstrated problem, and should be rejected. The Commission should seek to avoid customer confusion rather than creating new rules that would cause it.

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18 NAAG at 9.

19 *Compare* N.Y. Tax Law § 1105(b) (sales tax applies to intrastate service) *with* N.J. Stat. Ann. § 54:32B-3(f) (sales tax applies to intrastate and interstate service).

20 *E.g.*, Va. Code § 58.1-3812(A) (local authority to impose consumer utility tax limited to first $30 of monthly charges for mobile telecommunications service).

21 *E.g.*, I.R.C. § 4254(c) (excluding certain separately stated taxes from federal excise tax base). The federal excise tax base is incorporated in many state and local taxes.

C. The Commission Should Not Adopt Standard Category Labels.

Several parties ask the Commission to require standard labels.[22] AARP states that standard labels would facilitate consumers' understanding of charges and prevent fraudulent and misleading descriptions by carriers.[23] NASUCA argues that standard labels are necessary to ensure that carriers do not place misleading charges on their bills and would promote the ability of consumers to make price comparisons between providers.[24]

Contrary to the claims of the consumer groups, there is no problem that standardized labeling would fix because there are no concrete facts showing that the categories of charges that appear on bills today are misleading. Regardless of which labels that wireless carriers use for this section, whether "taxes and fees" or "government-mandated charges" or some variation thereof, consumers understand that charges contained in this section are the only ones that wireless carriers are required to pass along to their customers, and that all other charges are imposed by the carrier.

Standard labels would also be anti-competitive and undermine innovation.[25] Carriers seek to differentiate themselves based on their billing practices, and a

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22 AARP at 9-10; NASUCA at 14; *see also* BellSouth at 13 (standard labels should serve as a safe harbor for carriers in labeling mandated charges).

23 AARP at 9.

24 NASUCA at 14.

25 CCTM at 18-19; MCI at 8; Missouri PSC at 7, 8; Sprint at 20.

Commission rule that standardizes bills would remove the flexibility carriers have to compete by responding to customer preferences.[26]

As Verizon Wireless and many other commenters demonstrate, a requirement for carriers to use standard labels is not only unnecessary, it would be contrary to the First Amendment.[27] Under the *Central Hudson* test, the government action must seek to regulate expression protected by the First Amendment. "For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading."[28] The next step is to "ask whether the asserted government interest is substantial."[29] If both of these inquiries yield positive answers, then the third and fourth steps are to "determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."[30]

NAAG claims that standardized labels would pass muster under the four-part *Central Hudson* standard.[31] NAAG concedes that statements about charges on bills are a form of protected commercial speech.[32] NAAG argues, however, that standardized labels do nothing more than prohibit misrepresentation in commercial speech, and that even "[t]hough some commercial speech that might

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[26] Verizon at 6.
[27] AT&T at 7-9; CCTM at 20; CTIA at 12-15; MCI at 9-11; Nextel at 11-15; Qwest at 12; Sprint at 21; US Cellular at 5.
[28] *Id.*, 447 U.S. at 566.
[29] *Id.*
[30] *44 Liquor Mart, Inc. v. Rhode Island,* 517 U.S. 484, 500 (quoting *Central Hudson*, 447 U.S. at 566).
[31] NAAG at 7-8, *citing Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,* 447 U.S. 557, 561 (1980) ("*Central Hudson*").
[32] NAAG at 7.

not be deceptive would be regulated by clear and accurate labeling requirements," the government has a substantial interest in "ensuring the accuracy of commercial information in the marketplace."[33] NAAG's argument makes no sense. Neither NAAG nor any other commenter has demonstrated that category labels that carriers use today are misleading, and Section 64.2401(b), which now applies to CMRS, requires carriers to make descriptions of billed charges brief, clear, and non-misleading.[34] NAAG cannot establish that the government has an interest in regulating speech to ensure its accuracy because it fails to show that carriers are not accurately representing the categories on their bills, particularly when the FCC has already imposed rules requiring non-misleading bills.

NAAG argues that adopting standardized label requirements would directly advance the governmental interest in accuracy of bills.[35] A government body "seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree."[36] NAAG has not demonstrated that the government could choose labels that are any more accurate or less misleading than carriers' current labels. As Qwest states, there is nothing that uniquely qualifies regulators to assess whether one label is better than another.[37] Unlike the Commission, carriers regularly study bill design and conduct focus groups to understand how to

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33 *Id.* at 8, *citing Edenfield v. Fane,* 507 U.S. 761, 769 (1993).
34 47 C.F.R. § 64.2401(b).
35 NAAG at 8.
36 *Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 555 (2001) ("*Lorillard*").
37 Qwest at 12-13.

improve bills and are more likely to have insight into how to characterize category names in a non-misleading manner than the Commission.

NAAG attempts to satisfy the final part of the *Central Hudson* test by arguing that standardized labels are a narrowly tailored response to the stated objective because although they would be constrained by standardized labels, carriers would not be prevented from expressing their views about the charges by whatever non-deceptive means they desire.[38] The Supreme Court, however, has rejected even limited burdens on speech and even if there is an alternative opportunity given for the speech.[39]

AARP argues that labeling is not an impermissible restraint on speech because it seeks to regulate conduct and not content. But written communications about commercial information, such as the labels that apply to bill categories, are clearly commercial speech, not conduct.[40] Courts have found that to qualify as a regulation of conduct governed by *United States v. O'Brien,*[41] the government's regulation must be unrelated to expression.[42] Here, a labeling restriction would regulate directly how carriers communicate to their consumers and thus is by

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38 NAAG at 8.

39 *Lorillard*, 533 U.S. at 567 (restriction on displaying tobacco ads lower than five feet not justified even though tobacco ads not prohibited above five feet).

40 *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 670 (1985) (use of illustrations or pictures in advertising are entitled to the First Amendment protections afforded verbal commercial speech.)

41 *United States v. O'Brien,* 391 U.S. 367 (1968).

42 *See Lorillard*, 533 U.S. at 567.

definition related to expression.[43] AARP's argument to the contrary simply has no basis.

D. There is No Rationale For Prohibiting Carriers to Combine Federal Regulatory Charges.

The majority of commenters believe that the Commission should not require carriers to separate the components of federal regulatory charges.[44] AARP and NASUCA disagree, but the Commission should reject their arguments.

AARP maintains that carriers should not be permitted to combine federal regulatory charges because these line items are vague and provide carriers with the opportunity to recover costs that should be included in the overall cost of service.[45] AARP's argument, however, addresses whether carriers should be permitted to include these line items at all, not whether separation of these charges would promote some separate purpose. The Commission has already addressed these concerns in the *Second TIB Order*, when it made clear that line items that seek to recover the costs of federal regulatory programs are permissible,[46] and that it is misleading for carriers to imply that a charge is required by the government when it is the carrier's business decision to pass along the charge.[47]

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[43] *Id.*

[44] *See, e.g.,* AT&T at 11; CCTM at 21-22; Cingular at 57-58; CTIA at 15-17; MCI at 7; Nextel at 18; SBC at 9.

[45] AARP at 12.

[46] *Second TIB Order*, ¶ 23.

[47] *Id.* ¶ 27.

NASUCA asserts that lump sum charges hinder consumers' efforts to make accurate comparisons among different carriers.[48] NASUCA also claims that line items that aggregate the costs of multiple regulatory programs together leave consumers confused, particularly if they include operating costs, because they invite customers to "direct the ire that results toward 'Big Brother' rather than the carrier that opts to recover" these costs.[49]

However, separating federal regulatory charges on the bill would not make it any easier to compare carriers than if carriers lump these charges together. The important point of comparison is the sum of these charges, not their component parts. Verizon Wireless, for example, collects its 5 cents per month Regulatory Charge to defray the costs of multiple federal charges, including fees paid to the FCC for licenses pursuant to Section 9 of the Communications Act, fees paid to support the North American Numbering Plan, and fees for the administration of local number portability. It would make no sense for the Commission to require Verizon Wireless to have a separate line item for each charge when each one is only at most a few cents per month. This would only lengthen bills and make them more confusing, and, as stated above, the FCC has already made clear that carriers cannot characterize their operating costs as costs associated with government action. The FCC's *Second TIB Order* thus comprehensively addresses the consumer groups' concerns, making a new rule unnecessary.

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48 NASUCA at 21.

49 *Id.* at 22 n.59.

E. Wireless Carriers Should be Permitted to Recover the Costs of Interstate TRS Through Line-Item Charges.

Cingular was the only other carrier besides Verizon Wireless to address whether wireless carriers should be permitted to recover the costs of interstate TRS as a separate line item.[50] Verizon Wireless agrees with Cingular that it is critical for the FCC to clarify now, instead of in a future proceeding, that wireless carriers are permitted to recover their costs of interstate TRS through line items.[51] This is particularly important given the dramatic increase in the size of carriers' TRS funding obligations.[52] Both Verizon Wireless and Cingular showed that the decade-old orders cited in the Commission's discussion of TRS line items related to the recovery of TRS costs by landline carriers, not to CMRS providers. No parties opposed this position. The Commission should move expeditiously to confirm that wireless carriers may recover the costs of interstate TRS through line items, just as they may recover other fees paid to support federal mandates.

III. THE COMMISSION SHOULD REJECT THE NUMEROUS POINT-OF-SALE DISCLOSURE PROPOSALS THAT EXCEED THE AVC.

The consumer groups' comments are replete with proposals to govern point-of-sale disclosures. These proposals basically fall into two categories: substantive

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[50] Cingular at 59-66.

[51] *Id.* at 60.

[52] *Compare* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Order,* 19 FCC Rcd 1224 (2004) (setting total fund size at $289,352,701 and a carrier contribution factor of 0.00356) *with* Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, *Order,* CC Docket No. 98-67; CG Docket No. 03-123 (rel. June 28, 2005) (setting total fund size at $413,737,460 and carrier contribution rate at 0.00528).

requirements for disclosure and how the FCC should enforce these new rules. The Commission should decline to adopt any of these recommended requirements or at most adopt a simple point of sale rule for wireless carriers based on the AVC.

A. Detailed Point-of-Sale Rules for CMRS Providers Are Unnecessary.

The consumer groups urge the FCC to regulate virtually all aspects of the disclosures that carriers make at the point of sale. For instance, AARP and NAAG agree that carriers should disclose the full rate at the point of sale and that ranges of rates are misleading, although NAAG acknowledges, as does the AVC, that a range might be appropriate for locale-specific charges.[53] AARP, NAAG, and NASUCA all argue that if the Commission permits carriers to disclose a range of charges, it would not be reasonable for the range to vary more than 10 percent from the actual price charged.[54] AARP and NAAG both ask the FCC to require point-of-sale disclosures to be made before the customer signs a contract.[55]

The Commission should reject these proposals. As an initial matter, as several carriers point out, disclosure of the full rate that a customer will be assessed for monthly service is impossible to know in advance because usage-based charges require evidence of probable calling patterns, and contribution factors often change.[56] The AVC accounts for this by not requiring disclosure of a specific rate. Instead, the AVC permits carriers to disclose that taxes, surcharges, and other fees apply, and for monthly discretionary charges that do not vary by

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53 AARP at 29; NAAG at 12.
54 AARP at 30; NAAG at 12; NASUCA at 54.
55 AARP at 25; NAAG at 11.
56 BellSouth at 15-16; MCI at 12; Nextel at 19; Sprint at 22; US Cellular at 8.

locale, carriers must disclose the dollar amount or percentage that applies. For monthly discretionary charges that vary according to location, carriers are permitted to disclose the full possible range of total amounts or the maximum possible percentage that would apply. The Commission should reject any proposal that suggests it is possible to provide customers with a specific charge.

With respect to disclosure of a range of charges no greater than 10 percent different from the actual charge, Verizon Wireless agrees with Cingular that as long as a consumer is apprised of the highest possible charge that might apply, consumers will not believe that they have been misled.[57] Although a customer might be pleasantly surprised that a charge is lower than first indicated, a customer is only likely to complain if a charge is higher than the maximum first quoted. The percentage deviation is irrelevant. The Commission should therefore not require the range of charges that carriers disclose to customers to be within a set percentage of the actual price.

The Commission should also not require carriers to disclose the fees that will apply at any particular point in the sales process. Aside from the fact that there is no factual support for it in the record, such a rule would micromanage the sales process, and no rule can account for the varying ways that customers sign up for service. Wireless customers, for example, obtain service, at their choice, through the Internet and through voice calls to a carrier as well as by visiting a wireless store. They may buy post-paid service, pursuant to an agreement, or pre-

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[57] Cingular at 56.

paid service without such an agreement. Verizon Wireless customers entering agreements receive detailed information about the service plans they sign up for, as well as the costs and charges associated with such plan. This includes a "pro-rate receipt" at retail locations that provides an estimate of the first bill, including taxes and other charges. Verizon Wireless developed the pro-rate receipt to differentiate its sales practices and attract customers, precisely what a competitive market should encourage. Government regulation is clearly not justified.

B. The FCC Should Reject the Proposed Enforcement Mechanisms That Are Based on The FCC's Slamming Rules.

The Commission should reject the various proposals that parties make based on the Commission's slamming rules. AARP, for example, argues that the Commission's slamming rules are a good model for enforcement of the Commission's truth-in-billing rules.[58] Other parties argue for state enforcement of FCC rules,[59] verification of point-of-sale disclosures,[60] penalties to be imposed for violations,[61] and placing the burden of proof on the carrier to demonstrate disclosures.[62]

As NASUCA concedes, a regulatory model similar to the Commission's slamming rules that allows states to enforce the Commission's truth-in-billing

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[58] AARP at 30.
[59] NAAG at 12; OCC at 2; *but see* NASUCA at 16-18; Sprint at 11-14.
[60] AARP at 27; *but see* NASUCA at 18 (no billing corollary to slamming verification).
[61] AARP at 30; NASUCA at 56.
[62] AARP at 27.

rules would be an unlawful sub-delegation of the Commission's authority pursuant to the *USTA* case.[63] AARP ignores this fatal problem with its argument. Unlike 47 U.S.C. § 258, which provides a specific role for state enforcement of the Commission's slamming rules, there is no similar statutory authority in the truth-in-billing context. As Verizon Wireless demonstrated in its comments,[64] the Commission relied on Section 332 rather than Section 258 to impose its truth-in-billing rules on wireless carriers, presumably because the Commission has exempted CMRS carriers from the verification requirements of Section 258.[65] The slamming model thus has no relevance to wireless carriers, and the Commission should use its traditional enforcement powers to enforce violations of its truth-in-billing rules.

IV. THE COMMISSION SHOULD NOT ADOPT A RETURN RULE.

NASUCA requests the Commission to adopt a rule that provides consumers up to 45 days after receipt of their first bill to cancel a new or changed service without penalty.[66] As an initial matter, this proposal is outside the scope of this proceeding.

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63 NASUCA at 17, *citing United States Telecomm Ass'n v. FCC,* 359 F.3d 554, 566 (D.C. Cir.), *cert. denied sub. nom.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. United States Telecom Ass'n,* 125 S.Ct. 313 (2004).

64 Verizon Wireless at 23 n.89.

65 Implementation of the Subscriber Carrier Selection Changes Provision of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Second Report and Order and Further Notice of Proposed Rulemaking,* 14 FCC Rcd 1508, 1560 (1998) (CMRS exempt from verification requirements because slamming does not occur in the CMRS context).

66 NASUCA at 54.

The proposed return rule in essence seeks to prohibit carriers from imposing an early termination fee ("ETF") until 45 days after the consumer receives the first bill, and therefore has nothing to do with billing. It also was not discussed in the *Second FNPRM* and thus cannot be considered further. While point-of-sale disclosures arguably have some relationship to billing and were specifically raised by the *Second FNPRM* because they provide consumers with the information that will be on the bill, a proposal that requires carriers to permit returns without penalty has no direct tie to billing. Customers could presumably return their phones for any reason at all, not just if they did not understand their bills. For these reasons, the Commission should decline to consider adopting a return rule.

The Commission should also reject NASUCA's proposal for a number of other reasons. First, as stated above, wireless carriers that are signatories to the CTIA Consumer Code all have return policies that are at least 14 days, and some carriers have longer return policies. For instance, Verizon Wireless has a 15-day return policy, and Cingular permits 30 days. This is exactly how a competitive marketplace works, in that carriers market their features of plans and service, including their return policy, and then customers evaluate how important the return policy is in making a decision to purchase service. These periods are long enough to give customers a chance to try their service and determine whether they have coverage in areas where they need it and that the service works as expected. Even periods shorter than NASUCA's 45-day proposal cost carriers millions of dollars, however, because when customers return their handsets before the expiration of the return period, companies cannot resell the used handsets as new and must internalize this cost and the lost profits, particularly if the customer was under a long-term contract. An extended return period would only exacerbate this problem.

Second, NASUCA fails to demonstrate any tangible benefits to the consumer of a period 45 days beyond receipt of the first bill. NASUCA's theory is that customers should receive their first bill and then have 45 days after that to cancel the contract because consumers need time to review their first bill to determine what carrier-imposed line items they will be paying and whether they want to continue service with the wireless carrier. Yet, given that the record fails to establish that customers are not receiving disclosures at the point of sale, and, as noted above, the AVC expressly requires the signatory carriers to provide detailed disclosures of all rates, charges, terms and conditions at point of sale, there is no basis for the Commission to impose an extended return policy. In addition, as demonstrated above, Verizon Wireless' own complaint data contradicts NASUCA's theory that consumers are unhappy with its line-item charges, and proponents of this rule offer no evidence that consumers wish to terminate service because of the line items that appear on bills.

Third, the vast majority of Verizon Wireless customers have agreed to a one-year or two-year contract for service. All customers have an option to avoid entering into a long-term contract for wireless service by purchasing pre-paid service, but pre-paid customers pay more in up-front costs and higher per-minute rates than post-paid customers. For example, a Verizon Wireless customer can purchase a handset for $49.99 if the customer enters into a two-year contract or pay $100 more for the handset and activate pre-paid service. The fact that most customers opt to pay for equipment and service over an extended period rather than purchasing pre-paid service suggests that consumers prefer not to make large up-front payments and benefit from the subsidized equipment offered as part of a contract with a limited return period.

Carriers can offer subsidized handsets and favorable price plans to customers because they recover these costs over the term of the contract or by collecting an ETF. Deferring the time that carriers must wait until they can apply an ETF would increase costs, and likely the price, for wireless service. Carriers would also have little incentive to continue offering subsidized phones and promotional price plans. The Commission should therefore not impose a return rule that defers the application of ETFs.

V. OTHER COMMENTERS HAVE FAILED TO REFUTE VERIZON WIRELESS' ARGUMENTS IN FAVOR OF PREEMPTION.

In large part, the governmental and consumer rights advocates argue that the FCC may not preempt state wireless billing regulations because: (1) federal statutes preserve some sort of role for state regulation; and (2) preemption, in any form, does not apply in this case. These commenters are mistaken in both respects.

A. No Provision of Law Preserves a State Role in the Regulation of Wireless Billing Practices.

Section 332(c)(3)(A) of the Communications Act makes plain that "no State or local government shall have *any* authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[67] Despite this plain language, a number of commenters argue that the states and the FCC should regulate wireless billing practices on a co-equal basis.[68] NAAG, for example, argues that "[t]he statutory language and the Congressional history of the Communications Act are replete with Congress's intent to preserve the dual federal and state jurisdiction over interstate and intrastate telecommunications services and Congress's acknowledgement and expectation that the States will use their traditional police powers to protect their telecommunications consumers in the marketplace."[69] As shown below, however, Congress's national deregulatory wireless policy leaves no room for the states to regulate wireless billing practices.

AARP, NAAG, and NASUCA allege that the legislative history of Section 332 indicates a Congressional intent to leave billing practices to the states. Specifically, they refer to a House Report accompanying the passage of OBRA that contained an illustrative list of "other terms and conditions" to assert that billing practices fall within the savings clause.[70] These arguments, however, elevate a

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67 47 U.S.C. § 332(c)(3)(A) (emphasis added).

68 AARP at 14; NASUA at 36.

69 NAAG at 14-15.

70 AARP at 15-16; NARUC at 13; NAAG at 17; NASUCA at 24, 41-42.

lone House Report over the actual text of Section 332 and the courts' broad construction[71] of what comprises rate or entry regulation. Moreover, neither that House Report nor Section 332 do anything more than state that Section 332 itself does not preempt states from terms and condition regulation. As Verizon Wireless has shown, the Commission retains full authority to preempt such state regulation.

A number of commenters, including NARUC, NASUCA,[72] and AARP[73] allege that Section 2(b) of the Act[74] provides states with an explicit right to regulate billing practices. For example, NARUC claims that Section 2(b) specifically prevents the FCC from barring state regulation that does not interfere with the FCC's ability to ensure efficient and nationwide phone service.[75] This argument, however, ignores the plain text of Section 2(b),[76] which specifically exempts wireless services from any sort of federal-state jurisdictional division "[e]xcept as provided in . . . section 332 of this title."[77] Nothing in that provision

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71 *See, e.g., AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa.").
72 NASUCA at 29-30, 34.
73 AARP at 16-17.
74 In relevant part, Section 2(b) states "Except as provided in . . . section 332[,] nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . ." 47 U.S.C. § 152(b).
75 NARUC at 11, 13.
76 *See* Verizon Wireless at 6-7 (citing 47 U.S.C. § 152(b)).
77 47 U.S.C. § 152(b).

preserves against all forms of preemption state authority to regulate billing practices.

AARP and NASUCA further contend that the slamming verification procedures contained in Section 258 provide states jurisdiction over matters relating to intrastate service, including billing regulations.[78] In relevant part, Section 258 states that "[n]othing in this section shall preclude any State commission from enforcing such procedures with respect to intrastate services."[79] Section 258, however, simply does not apply to wireless billing regulations covered by Section 332. Rather, these provisions are exclusively directed toward curbing illegal changes in wireline subscriber carrier selections. Consequently, nothing in Section 258 affects the Commission's ability to preempt state billing practices.[80]

AARP, NARUC, and NASUCA also assert that billing regulations properly lie within the states' traditional police powers. AARP casts consumer protection

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[78] NASUCA at 35; AARP at 18. In particular, NASUCA states that, "as the Commission recognized in more enlightened times, even its authority to prescribe verification procedures to deter slamming under § 258 of the Act did not preclude more stringent state verification regulations." AARP notes that consumer groups point to slamming verification procedures to "reflect Congress' intent that States retain jurisdiction over the traditional areas of state regulation."

[79] 47 U.S.C. § 258(a).

[80] Even assuming for the purposes of argument that Section 258 applies to wireless billing, it does *not* confer jurisdiction upon states to create regulations, but rather ensures that State commissions can *enforce* federal procedures with respect to intrastate service. Section 258 merely illustrates Congress's desire for the states to enforce national, Commission-created regulations that ensure carriers do not illegally change a customer's carriage. If anything, Section 258 illustrates Congress's and the Commission's intent and ability to create a national regime regulating telecommunications charges. *See* 47 C.F.R. §§ 64.1100 – 64.1195 (Commission's national regulatory scheme for slamming rules).

and billing regulations as traditional state police powers,[81] while NARUC and NASUCA[82] contend that a general pro-competitive national regime cannot overcome traditional state powers.[83] By attempting to use the label of traditional state powers to limit preemptive language, these commenters implicitly assert a presumption against federal preemption.[84] Generalized appeals to federalism ignore the fact that here Congress expressly and broadly preempted "*any* [state] authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service."[85] Moreover, as articulated in greater detail in Section V.B, *infra*, the presumption against preemption does not apply when Congress has expressly evidenced an intent to preempt and when the federal government has had a historic federal presence in the field in question. The federal government has long regulated matters related to wireless and radio

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81 AARP at 15, 19.

82 NARUC at 10; NASUCA at 26.

83 NAAG also makes a curious and unelaborated argument that preemption would "circumvent [the] states' Tenth Amendment rights." NAAG at 26. That is just another way, however, of invoking the presumption against preemption, a statutory construction tool that is grounded in Tenth Amendment concerns. *See, e.g.*, *Brotherhood of R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 398 (1969) (observing that the "Court, mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favor of . . . the States to legislate in their customary fields"). That presumption does not apply to the regulation of wireless radio communications, which has long been an area uniquely subject to federal control. *See infra* Section V.B.

84 AARP at 19 ("The U.S. Supreme Court has held that when looking at the initial question of whether preemption exists or the scope of preemption, the analysis 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

85 47 U.S.C. § 332(c)(3)(A) (emphasis added).

broadcasting, and both the 1993 Amendments ("OBRA") and the Act as a whole indicate a clear Congressional desire to implement a national pro-competitive marketplace with respect to CMRS.

B. The Consumer and Governmental Interest Groups Misapply Controlling Preemption Law.

Some commenters argue that the FCC may, under established and controlling law, preempt state billing regulations based on either express, conflict, obstacle, or field preemption. In making these arguments, the commenters misapply basic principles of federal preemption and over-read both the exception clause of Section 332(c)(3)(A) and the presumption against preemption.

1. Contrary to the Arguments of the Consumer Groups, Express Preemption Applies Here.

Some commenters allege that nothing in 47 U.S.C. § 332 expressly preempts wireless billing practices. According to these commenters, this purported lack of express authority means that the FCC lacks any power to preempt state wireless billing regulations. For example, AARP contends that "the Commission has not pointed to any statutory language that expressly preempts the States' ability to regulate billing practices."[86] Likewise, NAAG advances roughly three arguments against express preemption:[87] (1) Congress's use of "regulate" rather than something like "relates to" suggests a narrower reach of preemption than statutes such as the Airline Deregulation Action of 1978;[88] (2) a

[86] AARP at 21.
[87] NAAG at 13.
[88] *Id.* at 17 (citing 49 U.S.C. § 1305(a)).

number of appeals and district courts have held that consumer protection is a traditional state function and that courts should narrowly construe allegedly ambiguous language such as "entry of or rates charged by";[89] and (3) state consumer protection legislation – including rules regarding late fees and billing contrary to the terms of an agreement – fall within the language of Section 332(c)(3)(A) that allows states to regulate "the other terms and conditions of commercial mobile services."[90] AARP, NARUC, and NASUCA similarly focus on "other terms and conditions" clause.[91]

As the Supreme Court has repeatedly held, a federal agency may preempt state law when "it is acting within the scope of its congressionally delegated authority" to do so.[92] Such authority is clearly present here. Verizon Wireless has demonstrated that Section 332(c)(3)(A) expressly preempts the regulation of an extremely wide range of matters relating to billing.[93] The section contains broad, forceful, and unambiguous language, preempting "*any* [state] authority to regulate the entry of or the rates charged by" wireless providers.[94]

NAAG's invocation of two different preemptive statutes does not detract from the Commission's and courts' broad interpretations of "regulate" in Section

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89 *Id.* at 18-20 (citing, *inter alia*, *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004); *Communications Telesystems Int'l v. Cal. Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999)).

90 *Id.* at 15-16, 18-20.

91 AARP at 15; NARUC at 11; NASUCA at 41, 45, 49.

92 *New York v. Federal Energy Regulatory Commission*, 531 U.S. 1, 18 (2002) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

93 Verizon Wireless at 16-20.

94 47 U.S.C.§ 332(c)(3)(A) (emphasis added)

332. The Commission has read this language in an expansive manner to preempt regulations affecting both "rate levels" and the more broadly defined "rate structures."[95] Courts have construed "entry of or rates charged by" in a similarly broad manner to include matters such as general consumer complaints: "In practice, most consumer complaints will involve the rates charged by telephone companies or their quality of service."[96]

The attempts of NAAG and others[97] to use the presumption against federal preemption,[98] applied in cases such as *Medtronic v. Lohr*[99] and *United States v. Locke*,[100] are similarly unavailing. No presumption against preemption exists when, as with Section 332(c)(3)(A), Congress has expressly preempted state

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95 *See, e.g.*, Southwestern Bell Mobile Systems, Inc.; Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments, *Memorandum Opinion and Order*, 14 FCC Rcd. 19898, 19907, ¶ 20 (1999) (finding that "the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these.")

96 *See, e.g., Bastien v. AT&T Wireless Services*, 205 F.3d 983, 988 (7th Cir. 2000).

97 AARP at 19; NAAG 13,15.

98 The presumption against preemption operates as a form of statutory construction. The Supreme Court has described the presumption as "start[ing] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992) (internal quotation marks omitted) (alteration in original). However, as discussed here, the presumption does not apply in situations where Congress has explicitly preempted a state matter by statute or where the preemption occurs in a field traditionally occupied by a significant federal presence.

99 518 U.S. 470 (1996).

100 529 U.S. 89 (2000).

regulation by statute.[101] Moreover, no such presumption applies in a field such as CMRS "where there has been a history of significant federal presence."[102]

NAAG's third argument – which relies on the "other terms and conditions" clause of Section 332(c) and was also made by NASUCA, NARUC, and AARP – fails for two primary reasons. First, as Verizon Wireless has repeatedly shown, although cast as billing regulation, many state laws clearly regulate rates within the definition of Section 332(c). Secondly, as discussed *infra*, even if the clause protects billing information from express federal preemption, it does not prevent the Commission from acting in its regular capacity to implement Congress's desire for a national wireless market and to preempt state regulations that conflict with those implementing regulations.[103]

2. The Consumer Groups Fail to Explain Why the FCC Should Not Invoke Conflict Preemption.

In addition to the express language of Section 332, Verizon Wireless has also emphasized that the Commission has the authority to preempt state regulations that conflict with the general goals of the Communications Act.[104] In passing the 1996 Telecommunications Act, Congress intended to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and

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101 *Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001).
102 *Locke*, 529 U.S. at 108.
103 *See Geier*, *infra*.
104 Verizon Wireless at 21-24.

information technologies and services."[105] Just as federal statutes may preempt those state and local laws that stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"[106] federal regulations[107] may similarly preempt state regulations that obstruct Congress's goals of crafting a competitive and national wireless market for consumers. The Commission's *Vonage* decision[108] is an example of the proper use of conflict preemption in an industry – Voice-over Internet Protocol – that the Commission expressly found to be closely analogous to wireless.[109] Both T-Mobile and CTIA agreed with Verizon Wireless's conflict preemption analysis.[110]

Some commenters believe that the Commission cannot adequately prove that Congress had a clear and manifest intent to preempt the states in this matter.[111] As referenced in Section V.A of these comments, AARP, NARUC, and NASUCA attempt to characterize billing regulations as traditional police powers. NARUC, NASUCA, NAAG, and AARP allege that conflict preemption cannot exist without some sort of actual, identifiable conflict between state and federal

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105 S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement).

106 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

107 *Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141, 153 (1982).

108 Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, *Memorandum Opinion and Order*, 19 FCC Rcd 22404 (2004) ("*Vonage*").

109 *Id.*, 19 FCC Rcd at 22418, ¶ 22 (noting that VoIP is "far more similar to CMRS, which provides mobility, is often offered as an all-distance service, and needs uniform national treatment on many issues.").

110 T-Mobile at 18-21; CTIA at 18, 24-26.

111 AARP at 19, 21; NARUC at 11; NASUCA at 28; NAAG at 23.

statutes or regulations.[112] AARP alleges that Congress's creation of a savings clause indicates a preference to allow the states to regulate billing matters and undercuts an argument that state regulations are an obstacle to the Act's pro-competitive purposes.[113] NAAG claims that such billing matters do not conflict with any federal laws or regulations but actually foster the Act's pro-competitive ends by improving fairness and promoting competition.[114]

Arguments that touch on the presumption against preemption fail for reasons articulated previously. Claims that the Commission must identify actual conflicts before engaging in preemption undercut the very point of the national framework. Requiring CMRS providers to come to the Commission every time a state regulation hinders their ability to offer national, competitively-priced plans would impose further unnecessary costs on the providers. Indeed, in *Vonage*, the Commission emphasized that it "cannot, and will not, risk eliminating or hampering" a framework that "facilitates additional consumer choice, [and] spurs technological development."[115] Moreover, Verizon Wireless has offered New Mexico, California, Indiana, Georgia, Vermont,[116] and Louisiana as examples of

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112 AARP at 21; NARUC at 11; NASUCA at 28, 36; NAAG at 24.

113 AARP at 22.

114 NAAG at 24.

115 *Vonage*, 19 FCC Rcd at 22427, ¶ 37.

116 To provide the Commission with an example of a state consumer protection rule that has a direct impact on rates and conflicts with Section 332, Verizon Wireless offered, *inter alia*, Vermont's Proposed Billing Rule 7.618(C), which flatly prohibits consumers from paying basic service fees more than one month in advance.

state regulations that would undoubtedly conflict with a national wireless marketplace.[117]

While the "other terms and conditions" clause of section 332(c)(3)(A) insulates some state regulatory authority from express statutory preemption, it does not invalidate the "ordinary working of conflict pre-emption principles."[118] That is, the Commission may exercise its congressionally-directed authority to create a competitive, national wireless market and preempt state laws that stand as an obstacle to that end.[119] In short, Congress's decision not to preempt expressly simply means that it left the question of whether to preempt state billing regulations to the Commission's expertise.

Finally, for NARUC and NASUCA to claim that nothing has changed to warrant Commission action at this time, they must ignore the actions of the several states that have enacted or announced plans to enact additional and varying billing regulations *since the issuance of the first TIB order*.[120] These regulations would place differing and cumbersome regulatory obligations beyond those mandated by the Commission and would substantially interfere with the creation and maintenance of a national wireless marketplace.

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117 Verizon Wireless at 10-12.

118 *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869 (2000); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 352 (2001) (citing *Geier*); *Fisher v. Ford Motor Co.*, 224 F.3d 570, 573 (6th Cir. 2000); *Hurley v. Motor Coach Indus.*, 222 F.3d 377, 381 (7th Cir. 2000).

119 *See, e.g.*, An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Report and Order*, 86 FCC 2d 469, ¶¶ 79, 82 (1981); *cf Vonage*, 19 FCC Rcd at 22405, ¶ 1.

120 Verizon Wireless at 10-12.

3. The FCC May Rely Upon Obstacle Preemption.

Some commenters[121] have also asserted that nothing supports the conclusion that state regulations stand as an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[122] NARUC and NASUCA allege[123] that nothing has changed since the issuance of the original TIB rules[124] to warrant further preemption. As NASUCA asserts, "[t]he Commission does not explain in the Second FNPRM why such state regulations have become such an obstacle that they should be preempted altogether."[125] These objections to obstacle preemption also fail. Congress's objective of a national framework for wireless is abundantly clear.[126] As has been explained previously, the FCC does not have to wait for a specific obstacle to this objective to develop before the agency may preempt. Further, Verizon Wireless has offered several examples of enacted or proposed state regulations that obstruct Congress's creation of a national, uniform, and competitive wireless regime.

Some commenters also incorrectly assert that states provide needed additional support to the federal government and that state regulation does not hinder the development of a competitive and national wireless marketplace. Arizona argues that preemption eliminates local forums that offer consumers a

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121 AARP at 21; NAAG at 23-24; NASUCA at 27-28.

122 *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

123 NARUC at 10; NASUCA at 27.

124 Truth-in-Billing and Billing Format, *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 7492, 7507-08, ¶ 26 (May 11, 1999).

125 NASUCA at 27.

126 S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement).

"comfortable" means of obtaining wireless service[127] and that carriers simply factor various states' regulatory costs into the price of conducting a business across state lines.[128] AARP maintains that federal preemption would frustrate consumers by limiting their abilities to go to their local and state officials to seek remedies for alleged grievances.[129] AARP and NASUCA assert that wireless carriers have thrived despite operating in states with different billing practice regulations.[130] NASUCA also attempts to minimize concerns of "creeping federalism"[131] by noting that less than half of the states currently regulate wireless billing.[132]

The commenters' arguments largely *support* Verizon Wireless's contentions that a state-by-state regulatory patchwork stands as an obstacle to a nationwide wireless market. As the Commission has found[133] and as Chairman Martin has noted,[134] the Commission's deliberate implementation of Congress's desire for a national wireless framework has allowed the marketplace to flourish. For example, prices for services have decreased because wireless carriers have taken

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127 Arizona Corporation Commission at 5-6.

128 *Id.* at 7-8.

129 AARP at 13.

130 *Id.* at 22; *see also* NASUCA at 39-40.

131 NASUCA at 36; *see also* AARP at 14.

132 NASUCA at 32.

133 *See* Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Ninth Report*, 19 FCC Rcd 20597, 20644, ¶ 113 (2004).

134 Presentation of Commissioner Kevin J. Martin, Dow Lohnes-Communications Daily Speaker Series: Wireless and Broadband: Trends and Challenges, 2004 FCC LEXIS 5871, * 9 (recognizing that "[w]ireless could develop in this manner because of a consistent regulatory treatment throughout the country").

advantage of economies of scale and scope to reduce costs associated with matters like billing, facilities, and employee training.[135]

Contrary to Arizona's arguments, any *individual* state's decision to impose regulatory costs disrupts a carrier's ability to provide efficient and uniform service throughout the country. Consequently, local forums do not simply affect the consumers within one state but force consumers in other states to pay higher prices for service. Additionally, Arizona's suggestion that carriers factor regulatory costs into the price of doing business ignores the reality that consumers – including those outside of the states that adopt the burdensome regulations – ultimately pay those costs. AARP's contentions regarding consumer frustration ignore both that states may continue to enforce neutral consumer protection laws that do not specifically impinge on wireless billing and that preemption as envisioned by the Commission in the *Second FNPRM* would not, as AARP asserts, deprive consumers of a "local" forum to hear grievances. Furthermore, despite the arguments of AARP and NASUCA, the fact that companies have succeeded while hindered with some regulations does not argue in favor of allowing the hindrances to remain in place or, as is clearly happening, to proliferate. Rather, freeing the companies from any balkanized regulations would allow consumers to benefit even more from the increased competition and national efficiencies.

NASUCA's attempts to minimize the number, impact, and reach of state regulations suffer from two flaws. First, Verizon Wireless[136] has referenced the

[135] Verizon Wireless at 13-14.

fact that many states, including New Mexico, California, Vermont, Louisiana, Indiana, Georgia, and Kentucky have enacted or plan to enact additional and varying billing regulations *since the issuance of the first TIB order*.[137] Moreover, for reasons discussed previously, the FCC does not have to cite to specific conflicts or actual harms before acting to protect the national wireless marketplace.

4. The Consumer Groups Have Failed to Show that the FCC Cannot Properly Occupy the Field of Wireless Billing Regulation.

Verizon Wireless also argued that the Commission can preempt state regulation based on a theory of field preemption, in light of the Commission's plenary authority to occupy the field of wireless billing.[138] Some commenters, however, argue that field preemption is inappropriate because the Act specifically preserves the states' authority[139] and lacks language indicating that Congress intended for the Commission to occupy fully the field of wireless billing.[140] NARUC, AARP, and NASUCA argued that field preemption is usually found where the subject matter is of particular federal interest or under historic federal control and that billing information does not offer such a situation.[141] These commenters also pointed to the states' "historical role" in regulating the telecommunications industry as a basis for denying field preemption for wireless

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136 Verizon Wireless at 10-12; *see also* Dobson at 3-4; T-Mobile at 12-13.

137 Verizon Wireless at 10-12.

138 *Id.* at 24-27.

139 AARP at 23-24; NARUC at 8; NAAG at 21-22.

140 NASUCA at 43; NARUC at 8; NAAG at 33.

141 NARUC at 8 n.20; AARP at 23, ad NASUCA at 43.

billing.[142]

Although Congress has not used express language to preempt all wireless matters, the Supreme Court has held that preemption can be implied in the absence of explicit statutory language where state laws regulate conduct that Congress intended the Federal Government to occupy exclusively.[143] Such intent can be inferred from a "'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'"[144] In the *Second FNPRM*, the Commission noted that Congress prescribed a pro-competitive, deregulatory framework for CMRS, which has enabled wireless competition to flourish, with substantial benefits to consumers.[145] There is no room for disparate state regulations in this pro-competitive scheme. Commenters arguing against field preemption have ignored Congress's desire to create a deregulatory, pro-competitive, and national regime.

Additionally, while Section 332 does not expressly preempt states from regulating other terms and conditions, as noted previously, the section does not preserve the states' authority from implied preemption but simply exempts the states from preemption by Section 332 itself. That provision does not preclude the Commission from asserting plenary authority. To achieve the congressionally recognized, pro-competitive deregulatory framework, the Commission has already

142 NARUC at 8 n.20; NASUCA at 43.

143 *English v. General Electric Co.*, 496 U.S. 72, 79 (1990).

144 *Id.* (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (alteration in original)).

145 *Second FNPRM*, ¶ 35.

regulated various aspects of wireless that go beyond rates and entry.[146] Although states have historically regulated various aspects of telecommunications, the FCC has still preempted the states in several areas of telecommunications, including in the wireless and VoIP arenas and some customer service regulations.[147] In addition, field preemption would not eviscerate the states' traditional role in creating and enforcing general consumer protection and contract laws.[148]

C. Consumer and Government Interest Groups Misapprehend the Relevance of the Commerce Clause.

In its *Second FNPRM*, the FCC sought comment about whether requiring wireless carriers to satisfy 50 different states' billing regulations would stifle the further development of wireless competition and unreasonably burden interstate

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[146] The Commission has exercised its plenary authority with respect to technical standards, LNP rules, E-911 rules, CPNI customer information, telemarketing rules, coverage and build-out requirements, and disability rules. Verizon Wireless at 25-26.

[147] *See id.* at 25-26.

[148] As Verizon Wireless has stated, however, even with the creation of a national scheme regulating wireless billing, states will have the ability to continue enforcing general contractual and consumer protection statutes. *See* Verizon Wireless at 30-32. Eliminating disparate state regulations that specifically target wireless services will create a consistent set of national rules and will allow states to use generally applicable consumer protection laws to provide consumers with local forums. Such a federal-state partnership could not endanger consumer protections because states will still protect consumers against deceptive, fraudulent and unfair business practices and because the marketplace will require carriers to respond to customers' needs. As noted by wireless commenters and as demonstrated by the voluntary agreement between major wireless carriers and the Attorneys General of several states, the wireless industry is competitive, which compels carriers to promote customer satisfaction. Dobson at 3; T-Mobile at 3-4.

commerce in contravention of the Commerce Clause.[149] The Commission recently discussed the Commerce Clause in the *Vonage Order* and observed that "courts have held that 'state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause.'"[150]

In their initial comments, NARUC, NASUCA and NAAG asserted that, even if disparate state requirements burden interstate commerce, Congress *intended* such a burden by expressly giving states the authority to regulate under Section 332.[151] These commenters, however, ignore the fact – discussed above – that Section 332 does not preserve state regulation but merely exempts other terms and conditions by operation of that Section itself. State regulation of wireless billing violates the Commerce Clause by substantially conflicting with a common regulatory scheme in place in other states,[152] imposing high compliance costs that exceed any local benefit,[153] and creating extraterritorial effects.[154] Moreover, the Commission is obligated to presume that Congress did not intend to create such a constitutionally problematic scheme.[155]

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149 *Second FNPRM,* ¶ 50.

150 *Vonage,* ¶ 38 & n.134 (citing *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997)).

151 NARUC at 11, NASUCA at 31, NAAG at 27.

152 *See National Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 112 (2d Cir. 2001) (citing *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 445 (1978).

153 *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

154 *See Healy v. Beer Institute, Inc.*, 491 U.S. 324, 332 (1989).

155 *See, e.g., Illinois v. Krull,* 480 U.S. 340, 351 (1987) (explaining that "by according laws a presumption of constitutional validity, courts presume that legislatures act in a constitutional manner").

NASUCA and NAAG, however, argue that state regulations do not impose an unreasonable or excessive burden on interstate commerce, as illustrated by carriers' past compliance.[156] Instead, NASUCA asserts that the carriers "doth protest too much" and that such protests are "skimpy" because many states have removed wireless carriers from state utility jurisdiction.[157] Even so, as discussed previously, states have increasingly attempted to regulate every aspect of wireless service and have directly targeted wireless services with regulations. Over 50 state, territorial, and commonwealth legislatures can regulate or attempt to regulate wireless rates, structures, and contracts; an equal number of public utilities commissions or boards can similarly act. Thus, the possibility of inconsistent state regulations is not only a "serious" risk,[158] it is a virtual certainty, evidenced by the "actual or pending legislation"[159] and regulation. In order to comply with disparate state requirements, national and regional wireless carriers could be required to create state-specific commercial practices, plan offerings, and rate structures. This burden increases exponentially with each state that engages in wireless regulation[160] and excessively burdens wireless carriers in contravention of the Commerce Clause.

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156 NASUCA at 32, NAAG at 28-29.

157 NASUCA at 32.

158 *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 470 (9th Cir. 2001).

159 *Id.*

160 *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) ("Furthermore, if Illinois may impose such regulations, so may other States; and interstate commerce in securities transactions generated by tender offers would be thoroughly stifled"); *Union Pacific R. Co. v. California Public Utilities Com'n*, 346

CONCLUSION

For the foregoing reasons, the FCC should advance a national framework for regulation and federalize the regulation of wireless carrier billing practices. If the FCC finds that additional rules are necessary, it should impose standards that track those established in the AVC for bill formats and point of sale disclosures. The Commission should not impose expansive bill category separation, standardized labels, require carriers to recover all federal regulatory mandates in separate line items, or a return policy. The FCC should also permit CMRS carriers to recover their TRS contributions from their customers.

Respectfully submitted,

VERIZON WIRELESS

John T. Scott, III

John T. Scott, III
Charon Phillips
1300 I Street, N.W.
Suite 400 West
Washington, D.C. 20005
202-589-3740

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F.3d 851, 871 (9th Cir. 2003) ("[I]f California can require the Railroads to develop and to implement performance-based standards, so can every other state, and there is no guarantee that the standards will be similar. The effect of such a patch-work regulatory scheme would be immense.")